Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-804

CLEVELAND BOARD OF EDUCATION, et al.,

Petitioners,

v.

ROBERT ANTHONY REED, III, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JAMES A. RHODES, et al.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Cleveland Board of Education petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on August 23, 1979, affirming an order finding the Cleveland Board of Education liable for purposely segregating the schools of the Cleveland City School District and mandating a system-wide desegregation remedy.

OPINIONS BELOW

The order of the court of appeals, entered on August 23, 1979 and not yet officially reported, appears in the appendix to this petition. The two opinions of the District Court, which were considered together by the court of appeals, are reported in *Reed v. Rhodes,* 422 F. Supp. 708 (N.D. Ohio 1976) and *Reed v. Rhodes,* 455 F. Supp. 546 (N.D. Ohio 1978).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1). The opinion below was entered on August 23, 1979.

QUESTIONS PRESENTED

1. Whether systemwide segregative intent properly was inferred:

A. From a bona fide effort by petitioner Cleveland Board of Education to increase the number and percentage of black faculty, coupled with a demonstrated intent to assign that faculty systemwide.

B. From conduct of petitioner Cleveland Board of Education in its construction of schools at such places as were most convenient for the attendance of the largest number of students when such conduct was mandated both by state law and by applicable controlling federal court decisions.

C. When the employees of the petitioner Cleveland Board of Education used standardized administrative procedures in creating optional zones and boundary changes, and in using private facilities to locate the children at places that would be convenient for the attendance of the largest number thereof.

2. Whether the systemwide student reassignment plan ordered by the District Court, whereby every grade in every school must have a ratio of black and white students in approximate proportion to the systemwide ratio, exceeded the violation found, particularly where the evidence showed that Cleveland's residential areas are highly segregated by race.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Fourteenth Amendment to the United States Constitution, Section 1:

> ". . . nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the law."

B. United States Code, Title 28:

§ 1343. *Civil rights and elective franchise*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

° ° ° ° °

To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

C. United States Code, Title 42:

§ 1983. *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction there-

of to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

D. Ohio Revised Code, Chapter 33:

§ 3313.48 *Free Education To Be Provided; Minimum School Year.*

The Board of Education of each city, exempted village, local and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will be most convenient for the attendance of the largest number thereof.

STATEMENT OF THE CASE

This is a school desegregation case involving the Cleveland City School District, the largest school district in Ohio. Plaintiff's complaint was filed on December 23, 1973 as a class action. Jurisdiction was premised on 28 U.S.C. §§ 1343(3) and 1343(4).

After trial, which took place in late 1975 and early 1976, the District Court, on August 31, 1976, found the petitioners and Ohio State Board of Education guilty of violating the Fourteenth Amendment rights of black school children within that district by an alleged pattern of conduct which proved to the trial court's satisfaction that the District had engaged in intentional segregative practices for many years.

The District Court, on its own motion, certified the case for interlocutory appeal, pursuant to 28 USC § 1292-(b), on the ground that his order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

On July 20, 1977, after oral argument, the Sixth Circuit remanded the case to the District Court, without opinion, to reconsider the findings of fact and conclusions of law in light of the decisions of this Supreme Court in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) and *Brennan* v. *Armstrong*, 433 U.S. (1977). No additional testimony was offered by any party after this remand, although opportunity to do so was provided by the District Court. On February 6, 1978, the District Court issued its second liability opinion plus a remedial order which imposed a systemwide student reassignment plan, a systemwide faculty plan, and a plan for educational changes within the system.

The decision of the Sixth Circuit is based upon what it described as five systemwide violations; i.e. teacher segregation; school site selection, construction and additions; "cooperation" with federal agencies in their housing policies; an example of so-called "intact" busing during three semesters in 1962, 1963 and early 1964; and the use of theretofore accepted administrative procedures, i.e. optional zones, boundary changes, special transfers and private facilities to resolve overcrowding.

The Undisputed Evidence In The Courts Below, As A Matter Of Law, Failed To Establish Intentional Segregative Purpose Justifying A Systemwide Remedy.

(1) *Teacher segregation.* The Sixth Circuit found that teacher assignments by race "were a systemwide policy up to the filing of this complaint and beyond." The plaintiffs' exhibit relied upon by the Court of Appeals and the District Court contained statistics that were obsolete and totally incorrect at the time of trial, as petitioners showed.

The evidence showed that when Dr. Paul Briggs became superintendent in 1964 one of his first priorities was the nationwide recruitment of black teachers and black administrators. In the late 1960's, eager young black teachers, anxious to help black children in the inner-city, sought

and received assignments in black schools. The black community actively supported their demands. The percentage of black teachers in the Cleveland school system grew to 43 per cent before the trial.

In the early 1970's, the school administration realized that such assignment did not comport with the integration desires of the Board of Education. Thereupon, two school administrators, one for the elementary schools and one for the secondary schools, were charged with the sole duty of reassigning faculty and staff for the express purpose of integrating black faculty into white schools and white faculty into black schools. The result was so effective that when the District Court ordered the complete faculty integration of the Cleveland school system in 1977, pursuant to very tight racial ratios, less than 400 out of 5,600 teachers had to be transferred.

The Court of Appeals opinion states that "it is incomprehensible that a better racial mix among the faculty could not be achieved". This simply flies in the face of an undisputed record and repeats by rote the clearly erroneous findings of the District Court.

(2) *School Site Selection and Construction.* Both the District Court and the Court of Appeals held that the Board and its predecessors were guilty of intentional segregative conduct when they complied with the law of Ohio that mandated that schools should be built "at such places as will be most convenient for the attendance of the largest number thereof." (Ohio Revised Code § 3318.48.) This provision of the Ohio Revised Code previously had been construed by the Sixth Circuit Court of Appeals as compelling Ohio boards of education to follow a neighborhood school policy. *Deal v. Cincinnati Board of Education,* 369 F.2d 55 (6th Cir. 1966) cert. denied, 389 U.S. 847 (1967). Indeed a United States statute declares that "the neighborhood is the appropriate basis for determining public school assignments". (20 U.S.C. § 1701 (a)(2)). The

point is not whether the statute is an excuse for a constitutional violation by the Board, which it obviously is not, but that petitioners have been found guilty of intentional, deliberate segregative conduct for doing exactly what the laws of Ohio and a decision of the Sixth Circuit had ordered them to do.

(3) *Cooperation With Federal Agencies.* Petitioners were found guilty of intentional segregative conduct, justifying a systemwide desegregation remedy, because they obeyed federal laws by providing schools for children in housing projects at a time when, unknown to petitioners, those federal supported housing projects were engaging in what now is alleged to be unconstitutionally discriminatory practices. There is no question but that the record shows that certain public agencies, i.e. the Federal Housing Administration, the Cuyahoga Metropolitan Housing Authority, the City of Cleveland and others not parties to this action, engaged in discriminatory housing practices. Petitioners did not object to this testimony because it clearly showed that other public parties (as well as private persons and institutions) caused the residential racial segregation which existed and continues to exist in Cleveland.

The District Court placed their sins on petitioners and the Court of Appeals accepted that finding in spite of a clear holding by another panel of the Sixth Circuit that a school district is not liable for the conduct of federal agencies in a housing case. *Higgins v. Grand Rapids Board of Education,* 508 F.2d 779 at 789 (6th Cir. 1974). This Court also has held that actions of other public officials should not be visited upon a board of education; *Swann v. Charlotte-McKlenburg Board of Education,* 402 U.S. 1, 23 (1971), *Milliken v. Bradley,* 418 U.S. 717, 718 n.7 (1974). This Court also has held that changes in residential patterns cannot be the basis for a systemwide desegregation order against a board of education where they

are not attributed to any segregative actions on the part of the defendant, *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976).

(4) *"Intact" Busing.* The Court of Appeals zeroed in on an isolated example of a short-lived, three to four semester practice of the Board from January, 1962 to March, 1964 when, at several black elementary schools, to relieve overcrowding, students were bused to white schools and kept in their classes, without being spread out among the other students. What the District Court and Court of Appeals neglected to state was that the record disclosed that the United States Civil Rights Commission investigated the practice in 1966, found that it had been temporary and soon abandoned, and that by 1966 students were fully integrated into the receiving schools.

(5) *"Segregative" School Board Devices.* The final alleged systemwide violations claimed to establish segregative intent by the courts below are lumped together into optional zones, boundary changes, special transfers and use of private rental facilities and portable classrooms. All of these procedures were admitted by plaintiff and the courts which considered them to be customary administrative practices, widely used by the Cleveland school system and others, to meet particular needs. The Sixth Circuit affirmed the District Court's findings that in certain specified instances petitioners used these administrative devices for intentional segregative purposes. The evidence relied upon by the District Court consisted almost exclusively of exhibits prepared by plaintiffs' counsel. These exhibits showed effect only. They did not even purport to show intention.

While the Court of Appeals admitted that "we might not have seen the facts exactly as" the District Court "if we had been situated in the courtroom," it refused to hold its findings clearly erroneous. Putting aside the clearly

erroneous question, the basis for the Sixth Circuit's approval of the District Court findings in these instances is that the defendant board knew that the "predictable result" would be choices which would create or intensify racial segregation. The court of appeals held that the defendant board failed "to offer credible, racially neutral explanations for resulting segregation." To reach this conclusion, the Sixth Circuit, as had the District Court, simply ignored petitioners' evidence. Petitioners presented *undisputed, admitted documentary evidence as to every single challenged act of these petitioners,* dealing with boundary changes, conversion of board-owned facilities, optional zones, assignments of students, new construction, additions to existing schools, school closings, portable classrooms, rental of private facilities and special transfers, to explain their administrative action on grounds other than racially motivated ones. This evidence was never challenged. It was the only evidence that dealt with motive. It was simply ignored by the District Court and the Sixth Circuit, even though it was precisely the kind of evidence mandated by *Village of Arlington Heights* v. *Metropolitan Housing Development,* 429 U.S. 252 (1977).

The Systemwide Student Assignment Plan Exceeded The Violations Found By The District Court.

In *Dayton Board of Education v. Brinkman,* 433 U.S. 406 (1977), this Supreme Court reaffirmed the teaching of *Swann* that the scope of the remedy must not exceed the violation. The District Court, applying what it termed the "mathematical language of Dayton" (455 F. Supp. at 552), found that the segregative "incremental effect is 100%." (455 F. Supp. at 552). It thereupon required, as part of the remedy, that each grade in each school in the system have approximately the same racial ratio as the system as a whole.

In net effect, what the District Court found was that the City of Cleveland's schools, if operated as a racially

neutral neighborhood system, would have been perfectly integrated but for the constitutional violations. Of necessity, this finding presumed that there would be *no residential segregation* in the City of Cleveland absent the constitutional violations found. It is respectfully submitted that the remedy went too far.

The City of Cleveland's residential areas are highly segregated by race. This is particularly true as between the east and west sides of Cleveland. The east side is predominantly black, the west side is predominantly white. The City is divided, on a north-south axis, by a wide valley (approaching two miles in places) known as the Cuyahoga River Valley. Black persons have always lived on the east side. At first their numbers were small, but like many northern cities, Cleveland experienced a substantial black immigration in the 1950's and early 1960's. Not surprisingly, approximately 90% of the constitutional violations found occurred on the east side.

The simple fact is that the evidence clearly does not support the notion that the school system made *all* the difference in determining where people live. But the net effect of the systemwide student reassignment plan, with its tight racial ratios, is to pretend that the school system did make all the difference.

We respectfully submit that nothing in the record supports the broad equitable remedy imposed by the District Court and affirmed by the Sixth Circuit.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioners are not unmindful of this Supreme Court's recent decisions in *Columbus Board of Education* v. *Penick*, 99 S. Ct. 2941 (1979) and *Dayton Board of Education* v. *Brinkman*, 99 S. Ct. 2971 (1979).

Those decisions painted with a broad brush. They create substantial doubt, in their treatment both of segregative intent and scope of remedy, whether any northern school system can prevail in a school desegregation case. Indeed, serious doubts now exist as to whether there is any meaningful distinction between *de facto* and *de jure* segregation.

These are important questions. The lower courts require this Supreme Court's guidance so that the critical issues related to school desegregation cases, which are among the most important cases in the federal courts, be resolved as expeditiously as possible.

For the foregoing reasons, Petitioners request that a writ of certiorari be issued to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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